Office - Supreme Court, U.S.
FILED
OCT 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-363

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY AND CITICORP
Petitioners

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM
Respondent

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION,
HARTFORD NATIONAL CORPORATION, THE
COMMONWEALTH OF MASSACHUSETTS, THE STATE OF
CONNECTICUT AND BANK OF BOSTON CORPORATION
Intervenor-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS STATE OF CONNECTICUT AND BRIAN J. WOOLF, ITS BANKING COMMISSIONER, IN OPPOSITION TO PETITION

JOSEPH I. LIEBERMAN
Attorney General

ELLIOT F. GERSON
Deputy Attorney General

JOHN G. HAINES*
Assistant Attorney General

P.O. Box 120
Hartford, Connecticut 06101
Tel. (203) 566-4899

*Counsel of Record

QUESTIONS PRESENTED

Congress provided in the Bank Holding Company Act (the "BHCA") that any acquisition of a bank by a bank holding company must be approved by the Federal Reserve Board. Congress further provided in the Douglas Amendment to the BHCA, 12 U.S.C. §1842(d), that a bank holding company whose principal operations are in one state may not acquire a bank in another unless specifically authorized by the laws of that state. Against this background the following questions are presented.

1. Whether the provisions of the Connecticut Interstate Banking Act, which allow Connecticut banks to be acquired by similar institutions in the other New England states which grant reciprocal rights to Connecticut banks, are authorized by the Douglas Amendment and thus do not violate the Commerce Clause?

2. Whether the reciprocal provisions of the Connecticut and Massachusetts Interstate Banking Acts constitute an interstate agreement increasing the power of the states in a manner which interferes with federal supremacy in violation of the Compact Clause?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
REASONS FOR DENYING THE WRIT	7
A. There Is No Conflict With Any Decision of This Court or Any Federal Court of Appeals	7
1. There Is No Conflict With Any Decision of this Court	7
a. The Commerce Clause	7
b. The Compact Clause	12
2. There Is No Conflict With Any Federal Court of Appeals	14
B. There Is No Important Issue Requiring Settlement By This Court	15
CONCLUSION	18
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Bode v. Barrett, 344 U.S. 583 (1953)	12
Conference of State Bank Supervisors v. Conover, 715 F.2d 604 (D.C. Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1708 (1984)	15
First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, *reh'g. denied*, 385 U.S. 1032 (1966)	9
Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288, *cert. denied*, 423 U.S. 875 (1975)	6, 14, 15
Lewis v. BT Investment Managers Inc., 447 U.S. 27 (1975)	7, 8
New England Power Company v. New Hampshire, 455 U.S. 331 (1982)	8
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)	16
New York v. O'Neill, 359 U.S. 1 (1959)	12
Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946)	7
South Central Timber Development, Inc. v. Wunnicki, ____ U.S. ____, 104 S.Ct. 2237 (1984)	8
Sporhase v. Nebraska, 458 U.S. 941 (1982)	8
United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978)	5, 12, 13

Page

Virginia v. Tennessee, 148 U.S. 503 (1983) 5, 12

Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648 (1981) 7, 8

Legislative Materials

H. R. Rep. No. 609, 84th Cong., 1st Sess. (1955).... 8, 10

S. Rep. No. 1095, 84th Cong., 1st Sess. (1955) 10

102 Cong. Rec. 6858 (1955) 10, 11

102 Cong. Rec. 6752 (1956) 10

Administrative Materials

Bank of Boston Corp., 70 Fed. Res. Bull. 524 (1984) .. 4

Bank of New England Corporation, 70 Fed. Res. Bull. 374 (1984) 4, 15

Hartford National Corporation, 70 Fed. Res. Bull. 353 (1984) 4

Constitutional Provisions

Commerce Clause (U.S. Const. Art. I, §8, cl. 3) 4, 5, 6, 7, 10

Compact Clause (U.S. Const. Art. I, §10, cl. 3) 4, 6, 12, 13

Statutes

12 U.S.C. §1823(f) 3

Page

Bank Holding Company Act of 1956, 12 U.S.C. §1841 *et seq.* 2, 5, 9, 10

12 U.S.C. §1842(d) (Douglas Amendment) 2, 5, 6, 7, 8, 9, 11, 12, 13, 14

McFadden Act, 12 U.S.C. §36 ..... 9, 10

Alaska Stat. §06.05.235 15

Conn. Gen. Stat. §36-30, §36-92, §36-93, §36-140 13

Conn. Pub. Act. 83-411 ..... 3, 5

Me. Pub. Law 1983, ch. 302, §2 as amended (1984) .. 3, 15

Mass. Gen. Laws Ann., ch. 167A., §2 3

R.I. Pub. Law §0061 Sub. A (1983) 3

Other Authorities

Geographic Restrictions on Commercial Banking in the United States, The Report of the President, January 1981 ("Report of the President") 9

Glidden, *Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Banking System?*, 1980 U. Ill. L. F. 9

Report to the General Assembly of the State of Connecticut of the Findings and Recommendations of the Commission to Study Legislation to Limit the Conduct of Business in Connecticut by Subsidiaries of Bank Holding Companies and the Impact of the Non-

Page

Depository Institutions on Traditional Banking Activities, January 5, 1983 ("Hebb Commission Report") 16, 17

Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Power Issues in Controversies About Federalism,* 89 Harv. L. Rev. 682 (1976) 13

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY AND CITICORP
Petitioners

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM
Respondent

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION,
HARTFORD NATIONAL CORPORATION, THE
COMMONWEALTH OF MASSACHUSETTS, THE STATE OF
CONNECTICUT AND BANK OF BOSTON CORPORATION
Intervenor-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS STATE OF CONNECTICUT AND BRIAN J. WOOLF, ITS BANKING COMMISSIONER, IN OPPOSITION TO PETITION

The State of Connecticut and Brian J. Woolf, its Banking Commissioner, submit this brief in opposition to the petition for a writ of certiorari filed by Northeast Bancorp, Inc., Union Trust Company, and Citicorp.

STATEMENT OF THE CASE

The Petitioners claim that the Connecticut Interstate Banking Act and a similar law in Massachusetts violate the Commerce and Compact Clauses of the Constitution in that they only allow Connecticut and Massachusetts banks and bank holding companies to be acquired by banks and bank holding companies in the other New England states. The State of Connecticut asserts that its Act is authorized by §3(d) of the Bank Holding Company Act, 12 U.S.C. §1842(d), and that the reciprocal provisions of the Connecticut and Massachusetts Acts do not violate the Compact Clause.

The Bank Holding Company Act ("the BHCA"), 12 U.S.C. §1841 *et seq.*, provides for federal regulation of the creation and operation of bank holding companies. Section 3 of the BHCA requires that any acquisition of control of a bank by a corporation or partnership must be approved by the Federal Reserve Board. Section 3(d) of the BHCA, commonly known as the "Douglas Amendment," precludes the Federal Reserve Board from approving any application by which a bank holding company proposes to acquire an interest in a bank

> located outside the state in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 . . . ***unless [such acquisition] is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.***

12 U.S.C. §1842(d) (emphasis added).

The Douglas Amendment thus establishes a general bar under federal law to the acquisition of a local bank by an

out-of-state bank holding company but permits a state to enact specific legislation lifting this bar.[1]

By §§2 and 3 of Connecticut Public Act 83-411, the Connecticut Interstate Banking Act ("CIBA"),[2] the State of Connecticut accepted Congress' invitation to lift the bar of the Douglas Amendment. The State of Connecticut, however, does not read the authorization of state action in the Douglas Amendment as presenting a choice between no interstate banking (by leaving the federal bar in place), or unlimited interstate banking. In order to assess the benefits and detriments of interstate banking, the Connecticut General Assembly chose to authorize an experiment in interstate banking and to limit the scope of the experiment to the New England states. (*See* Res. Conn. App. at 6a). Thus, the above-referenced provisions of the CIBA permit Connecticut banking institutions to acquire or be acquired by banking institutions located in the other New England states (Massachusetts, Rhode Island, New Hampshire, Vermont, and Maine) provided they have adopted reciprocal legislation which the State Banking Commissioner finds is no more restrictive than the Connecticut Act.

The Commonwealth of Massachusetts had adopted similar legislation in 1982,[3] which the Connecticut Banking Commissioner has found is no more restrictive than the CIBA.[4]

---

[1]The only exception to the state line geographic restrictions on bank expansion in federal law is provided by 12 U.S.C. §1823(f) dealing with emergency acquisitions of failing institutions.

[2]Pet. App. at A97-100.

[3]Mass. Gen. Laws Ann. ch. 167A §2 (West 1971 & Supp. 1984), Pet. App. 101-102.

[4]Within New England, Rhode Island and Maine have also adopted interstate banking provisions. The Maine Act, Me. Pub. Law 1983, ch. 302, §2 as amended (1984), permits unlimited interstate banking. The Rhode Island Act, R.I. Pub. Law S 0661 Sub. A (1983), limits acquisition of its banks to bank holding companies located in the other New England states, but this restriction expires in 1986.

Pursuant to the BHCA and the state Acts, the Federal Reserve Board approved three applications for mergers or acquisitions by Connecticut and Massachusetts bank holding companies.[5]

In the proceedings before the Federal Reserve Board, petitioners, Northeast Bancorp, a Connecticut bank holding company and its subsidiary Connecticut bank, the Union Trust Company (collectively "Northeast"), and Citicorp, a New York bank holding company, opposed these transactions claiming, *inter alia,* that the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses of the Constitution. The Federal Reserve Board rejected these claims finding that "there is no clear and unequivocal basis for a determination that CIBA is inconsistent with the Commerce Clause, Compact Clause or Equal Protection Clause of the United States Constitution." *Bank of New England Corporation,* 70 Fed. Res. Bull. 374 (1984) (Pet. App. at A41). The same finding was made with regard to the Massachusetts Act. 70 Fed. Res. Bull. 353 (1984) (Pet. App. at A75).

Northeast and Citicorp appealed the Federal Reserve Board's rulings to the Second Circuit, again claiming that the Board's orders approving these transactions were unlawful because the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses of the Constitution. The Court of Appeals found both arguments plainly without substance.

---

[5]Bank of New England Corp. ("BNE"), a Massachusetts bank holding company application to acquire CBT Corp. ("CBT"), a Connecticut bank holding company, 70 Fed. Res. Bull. 374 (1984), Pet. App. at 34-71; Hartford National Corp. ("HNC"), a Connecticut bank holding company application to acquire Arltru Bancorporation ("Arltru"), a Massachusetts bank holding company, 70 Fed. Res. Bull. 353 (1984), Pet. App. at 72-78; and Bank of Boston Corp. ("BBC"), a Massachusetts bank holding company application to acquire Colonial Bancorp ("Colonial"), a Connecticut bank holding company, 70 Fed. Res. Bul. 524 (1984), Pet. App. at 79-87.

With regard to the Commerce Clause, the Court of Appeals held that the Connecticut and Massachusetts Acts were authorized by Congress in the Douglas Amendment. (Pet. App. at A31). As to the Compact Clause, the Court held that, even if the Connecticut and Massachusetts Acts were treated as a compact, they would not violate the Compact Clause because under the test stated by this Court in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978), there is no "combination tending to increase the political power in the states, which may encroach upon or interfere with the just supremacy of the United States." (Pet. App. at A32). Accordingly, the Court affirmed the orders of the Federal Reserve Board.

SUMMARY OF ARGUMENT

1. The provisions of the Connecticut Interstate Banking Act (Conn. P.A. 83-411, §§2, 3) which permit Connecticut banks and bank holding companies to be acquired by similar institutions in the other New England states with reciprocal laws do not violate the Commerce Clause. The CIBA is authorized by the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. §1842(d), which prohibits the Federal Reserve Board from approving any application by a bank holding company to acquire a bank in another state unless specifically authorized by the laws of that state.

2. Under this Court's test, the reciprocal provisions of the Connecticut and Massachusetts Interstate Banking Acts do not violate the Compact Clause because there is no interstate compact or agreement which tends to increase the power of the compacting states in a manner which interferes with federal supremacy. *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978); *Virginia v. Tennessee*, 148 U.S. 503 (1893). There is no overt agreement between Con-

necticut and Massachusetts; the state Acts provide no interstate apparatus for the regulation of bank holding companies; and there can be no interference with federal supremacy because the Douglas Amendment defers to state law on the issue of interstate banking.

3. There is no conflict with any decision of this Court or any other court of appeals. Indeed, the Second Circuit's decision is in accord with the decision of the one other circuit that has addressed the question. *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), held that

> the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy.

Id. at 1297.

4. While interstate banking is not an unimportant issue of public policy, there is no *legal* issue requiring settlement by this Court. The basic legal issues related to the Commerce and Compact Clauses are familiar learning, while the petitioners' major argument—that the geographic limitations in the Connecticut and Massachusetts Acts are bad national policy—should more appropriately be addressed to Congress.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY FEDERAL COURT OF APPEALS

1. *There Is No Conflict with Any Decision of this Court.*

a. *The Commerce Clause*

In its decision that the Connecticut and Massachusetts Interstate Banking Acts are authorized by the provisions of the Douglas Amendment, the Court of Appeals applied well-recognized Commerce Clause principles.

It is axiomatic that the Commerce Clause is a grant of plenary power to Congress to regulate commerce among the states and that this grant in no way restricts the authority of Congress to regulate interstate commerce. *Western & Southern Life Insurance Co. v. State Board of Equalization,* 451 U.S. 648, 652 (1981); *Lewis v. BT Investment Managers Inc.,* 447 U.S. 27, 35 (1975); *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 434 (1946). Indeed, as this Court stated in *Prudential Insurance Co. v. Benjamin, supra,* at 434:

> The power of Congress over commerce . . . is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade.

The Douglas Amendment's total ban on bank acquisitions across state lines is a clear example of this power to discriminate in favor of local trade. Indeed, the main impetus for the

BHCA was to protect local banks and maintain the diversity of the American banking system.[6]

It is also axiomatic that, in the exercise of its plenary authority over interstate commerce, "Congress may 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. at 652 (citing *Lewis v. BT Investment Managers*, 447 U.S. at 44). This Court has held, however, that any such authorization must be expressly stated in federal law. *South Central Timber Development, Inc. v. Wunnicki*, ____ U.S. ____, 104 S.Ct. 2237, 2242 (1984); *New England Power Company v. New Hampshire*, 455 U.S. 331, 340-41 (1982); *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

The State of Connecticut asserts that the Douglas Amendment is a clear expression of Congressional authority for the State to determine whether and on what conditions out-of-state bank holding companies shall be allowed to acquire banks in Connecticut, and that this determination may be made on the basis of local needs and local concerns. This assertion is made on the basis of the plain language of the Douglas Amendment and the long history of federal deference to state law on the issue of banking structure.

The most striking feature of American banking is its fragmented structure. Any discussion of that structure must begin with the "dual banking system" which permits institutions to be chartered by either the states or the federal government. The state and federal systems are not totally separate, however. Over the years, the two have been tied together by a complex network of federal regulation on the state system and various deferrals to state law in the federal system. The most

---

[6]*See* H.R. Rep. No. 609, 84th Cong., 1st Sess., 2, 5 (1955).

unusual point of fragmentation, however, is geographic. Unique among American industries, banks have been prevented from expanding across state lines, and in many states bank operations are limited to a single community.[7]

The unusual statutory circumstances which led to this balkanization of American banking into 50 separate banking zones are the result of choices made by Congress to defer to the states on the issue of geographic expansion by banks.

The first expression of this federal policy is contained in the McFadden Act, adopted in 1927 and amended in 1933 (12 U.S.C. §36), which limits national banks to the same branching powers as are expressly permitted to state banks under state law. The result of the McFadden Act is that banks chartered by the federal government are not allowed to operate nationally. They are locked in the same geographic compartments as their state chartered counterparts and only allowed to expand through branching in accordance with state policy. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, *reh'g. denied*, 385 U.S. 1032 (1966).

The second major piece of federal legislation which confined bank expansion to the borders of the states is the Douglas Amendment to the BHCA, 12 U.S.C. §1842(d).

The bank holding company movement was primarily a device to avoid restrictive state branching laws (as grafted onto the federal system by the McFadden Act) which limited bank expansion. By the time Congress addressed the bank holding company movement, several bank holding companies

---

[7]Glidden, *Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Banking System?* 1980 U. Ill. L. F. 369; *Geographic Restrictions on Commercial Banking in the United States, The Report of the President*, Department of the Treasury, January 1981.

were already operating large interstate networks.[8] Congressional response to this situation produced distinctly different bills in the House and Senate.

The House version of the BHCA would have barred bank holding company acquisitions of banks across state lines entirely.[9] The Senate bill would have permitted bank holding companies to acquire banks in other states subject to state power to block them under §7 of the BHCA, 12 U.S.C. §1846.[10] Senator Douglas then offered a compromise amendment which imposed a federal bar on interstate acquisitions but permitted the states to lift it.

In urging the adoption of his amendment, Senator Douglas stated:

> [O]ur amendment will permit out of state holding companies to acquire banks in other states only to the degree that state law expressly permits them . . . .

102 Cong. Rec. 6858 (1956).

In remarking on his amendment, Senator Douglas also stated:

> [I]t is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course,

---

[8]*See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 3-4 (1955).

[9]*Id.* at 3, 15.

[10]S. Rep. No. 1095, 84th Cong., 1st Sess. 10-11 (1955). *See also* 102 Cong. Rec. 6752-55 (1956).

> under the McFadden Act, even to expand within a State.

Id. at 6860.

Finally, in responding to criticism that his amendment would make interstate expansion more difficult, Senator Douglas stated that "if State law permits, and if approved by the [Federal Reserve] Board, interstate acquisitions are possible." *Id.*

In light of the plain language of the Douglas Amendment and the long history of federal deference to state law on the issue of bank expansion, the Court of Appeals correctly applied this Court's decisions requiring a clear statement of Congressional policy to authorize state regulation free of the negative implications of the Commerce Clause.

Finally, any attempt to read the negative implications of the Commerce Clause (and its implied hostility to state economic protectionism) into the Douglas Amendment is illogical. The Douglas Amendment—a federal Act—totally blocks the interstate acquisition of banks by bank holding companies. If there is one proposition on which no one can disagree, it is that the Douglas Amendment was not passed to facilitate the free flow of commerce. There is also no indication in the Douglas Amendment (or the McFadden Act) that uniformity of regulation among the states is required in the national interest. Indeed, the intent of Congress appears to have been quite the opposite. The result is our balkanized banking system.

In short, *Congress* restricted the flow of interstate commerce, but it gave the states the power to remove the obstruction—*for the benefit of a state or states*—and not because of any national interest in the free flow of commerce. In light of the severe geographic restrictions on bank holding

company expansion imposed by Congress, it is difficult to see how it can be claimed at all that the Connecticut Act "burdens" interstate commerce. Absent action by a state, there is no such commerce. Indeed, in lifting the bar of the Douglas Amendment, no matter how slightly, the state facilitates and expands the flow of commerce.

b. *The Compact Clause*

The Court of Appeals also applied clear precedent of this Court in determining that the Connecticut and Massachusetts Acts do not violate the Compact Clause. The Compact Clause is only violated where (a) there is an interstate compact or agreement, (b) which tends to increase the power of the compacting states in a manner which interferes with federal supremacy. *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978); *Virginia v. Tennessee,* 148 U.S. 503 (1893).

In addressing this issue, we note first that the passage of reciprocal legislation in Connecticut and Massachusetts did not occur pursuant to any explicit or tacit legislative or executive agreement. Rather, it constituted the independent act of each state. The enactment of such reciprocal legislation does not automatically create a "compact." *See New York v. O'Neill,* 359 U.S. 1, 19 (1959); *Bode v. Barrett,* 344 U.S. 583, 586 (1953).

Second, even if a compact could be said to exist, it fails the second prong of the test in *United States Steel v. Multistate Tax Commission, supra.* There is no increase in the power of the compacting states in any manner which interferes with federal supremacy.

No independent commission or other administrative body is authorized by the Connecticut Act. The Act does not create

any interstate apparatus for the administration of bank holding companies nor does it commit any state to approve any particular acquisition. In this regard, it should be noted that the Connecticut and Massachusetts Acts merely lift the bar of the Douglas Amendment. Other state laws set forth the criteria under which individual mergers or acquisitions will be considered.[11]

Finally, the Court of Appeals correctly found that the Connecticut and Massachusetts Acts do not interfere with federal supremacy. As a matter of federal policy, Congress has unequivocally deferred to the states—in the Douglas Amendment and in other federal acts—regarding bank expansion. Further, although Congress allowed the states to lift the limitation on interstate acquisitions of banks by bank holding companies, the Federal Reserve Board maintains full power and authority to pass upon all such acquisitions permitted by state law. State laws cannot operate so as to permit holding companies to make acquisitions in a manner that would be inconsistent with federal standards. Thus, federal supremacy relating to the expansion of bank holding companies remains fully protected and the exercise by the states of the power given to them cannot constitute an unwarranted intrusion on that supremacy.

In sum, the Connecticut and Massachusetts Acts do not require Congressional approval under the Compact Clause because "they neither project a new presence onto the federal system not alter a state's basic sphere of authority." L. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Power Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 712 (1976).[12]

---

[11]*See e.g.*, Conn. Gen. Stat. §§36-30, 36-92, 36-93, 36-140.

[12]Petitioners appear to confuse potential impact on "federal interests" with threats to "federal supremacy." That there is a federal interest no one denies. However, "[a]bsent a threat of encroachment or interference through enhanced state power the existence of a federal interest is irrelevant." *United States Steel*, 434 U.S. at 479, n.33.

2. *There Is No Conflict with Any Federal Court of Appeals.*

There is no conflict with any other court of appeals and, in fact, the Second Circuit decision is fully in accord with the decision of the District of Columbia Circuit in *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System,* 511 F.2d 1288, *cert. denied,* 423 U.S. 875 (1975). In that case the plaintiff, an association of Iowa bankers, appealed from a decision of the Federal Reserve Board approving the acquisition of two Iowa banks by a Minnesota bank holding company under a state law which permitted the acquisition of Iowa banks by any out-of-state bank holding company that already owned at least two banks in the state. The Iowa Act was plainly designed to serve Northwest Bancorporation, the only out-of-state bank holding company that would qualify.

The Association's appeal was based, *inter alia,* on the claim that the Iowa statute was invalid because it conflicted with the intent of Congress expressed in the Douglas Amendment. The Association claimed that

> implicit in the Douglas Amendment is a prohibition against discrimination between out-of-state bank holding companies. In other words, . . . the states can only decide whether to extend the right to acquire in-state banks to all out-of-state bank holding companies or to prohibit such acquisitions entirely.

511 F.2d at 1296.

After reviewing the Douglas Amendment and its history, the D.C. Circuit rejected the claim that the Douglas Amendment was intended to impose limitations on the power of the states. On the contrary, the court held that

> the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy. Petitioner's suggested interpretation of [the Douglas Amendment] would rob the states of this power.

Id. at 1297. The D.C. Circuit recently reaffirmed this view in *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604 (D.C. Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1708 (1984).

The clear import of the *Iowa Bankers* case is that a state may partially lift the bar of the Douglas Amendment and impose conditions and limitations on the entry of out-of-state bank holding companies to serve local needs.

B. THERE IS NO IMPORTANT ISSUE REQUIRING SETTLEMENT BY THIS COURT

While regional interstate banking is not an unimportant issue, it is not an issue requiring settlement by this Court.

Congress deliberately created the balkanized, fragmented banking system which exists in the United States, and it clearly deferred to state law on the issue of interstate banking. In line with the diversified nature of American banking and this deference to state law, the states have taken various approaches to interstate banking, applying economic[13] or geographic restrictions on the entry of out-of-state bank holding companies. Only two states, Alaska and Maine, presently allow unlimited interstate banking.[14].

---

[13]*See* order approving BNE/CBT merger, 70 Fed. Res. Bull. 374 (Pet. App. at A70-A71).

[14]Alaska Stat. §06.05.235; Me. Pub. Law 1983, ch. 302, §2, as amended (1984).

Before considering interstate banking in Connecticut, the Connecticut General Assembly appointed a special commission ("the Hebb Commission," Res. Conn. App. at 1a) to study the issue. In its report the Hebb Commission first noted the background against which its recommendations were made, including federal deregulation and the emergence in the financial services industry of such organizations as Sears, Merrill Lynch, Shearson/American Express and others. The Commission then stated that it believed "that the interest of both consumers and businesses in Connecticut would be well served by increasing the number of competitors and the vigor of banking competition in the state." (Res. Conn. App. at 3a-4a). But, the Commission observed:

> To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and business would not, we believe, serve our state well. Similarly, to expose our small banks to the rigors of unlimited competition from large out-of-state banking organizations . . . would not be wise.

Res. Conn. App. at 5a.

In balancing these conflicting considerations, the Commission recommended an "experiment" in interstate banking. The Commission stated that by an experiment,[15]

---

[15] *See New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting): "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

> we mean a first step toward interstate banking that would allow limited entry by out-of-state banking organizations and would afford the legislature an opportunity to make its own calculus of the benefits and detriments that might result from a broader program of interstate banking.

Res. Conn. App. at 6a.

The Commission then staked out the geographic boundaries of the experiment by recommending that it be limited to the New England states. In making this recommendation, the Commission stated:

> We believe that there is a natural economic and cultural community of interest among the New England states that would make such an experiment in regional banking a reasonable first step toward interstate banking. We further believe that the legislature would be justified in excluding New York from this first phase on the ground that New York is the home state of a number of the nation's very largest banking institutions and that it is necessary to assess the impact of out-of-state entry upon Connecticut banks in a more limited experiment in interstate banking before exposing our banking system to the full rigor of competition from these giant institutions.

Res. Conn. App. at 6a-7a.

Petitioners' basic argument in this case is that these parochial interests which are embodied in the Connecticut Act are bad economic policy for the nation. But, because the Connecticut Act is plainly authorized by Congress, petitioners' energies should be addressed to that body and not to this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfuly submitted,

State of Connecticut and
Brian J. Woolf, Its
Banking Commissioner

JOSEPH I. LIEBERMAN
Attorney General

ELLIOT F. GERSON
Deputy Attorney General

JOHN G. HAINES*
Assistant Attorney General

P.O. Box 120
Hartford, Connecticut 06101
Tel: (203) 566-4899

*Counsel of record

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY AND CITICORP
Petitioners

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM
Respondent

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION,
HARTFORD NATIONAL CORPORATION, THE
COMMONWEALTH OF MASSACHUSETTS, THE STATE OF
CONNECTICUT AND BANK OF BOSTON CORPORATION
Intervenor-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO THE BRIEF OF RESPONDENTS STATE OF CONNECTICUT AND BRIAN J. WOOLF, ITS BANKING COMMISSIONER, IN OPPOSITION TO PETITION

REPORT TO THE GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT OF THE FINDINGS AND RECOMMENDATIONS OF THE COMMISSION TO STUDY LEGISLATION TO LIMIT THE CONDUCT OF BUSINESS IN CONNECTICUT BY SUBSIDIARIES OF BANK HOLDING COMPANIES AND THE IMPACT OF NON-DEPOSITORY INSTITUTIONS ON TRADITIONAL BANKING ACTIVITIES

Edwin Gordon Hebb, Jr.
Chairman

January 5, 1983

Submitted Pursuant to Connecticut General Statutes Section 36-5b

(The "Hebb Commission Report") (Excerpt)

RECOMMENDATIONS

The Commission has given careful thought to the question whether Connecticut should be opened up to interstate banking. Under present federal law, the choice is entirely within the authority of the Connecticut legislature. Interstate branching is not presently permissible for member banks of the Federal Reserve System and nonmember banks are generally restricted to in-state branching by their own state laws. Through the so called Douglas Amendment to the Bank Holding Company Act of 1956, Congress has effectively prevented bank holding companies from acquiring additional bank subsidiaries outside their home state unless the law of the addi-

tional state explicitly permits an out-of-state bank holding company to acquire banks in that state. Thus, by taking no action at all, Connecticut can allow the prohibition of the Douglas Amendment to remain in effect and to preclude acquisitions of Connecticut banks by out-of-state banking organizations.

At the same time, it is within the authority of the Connecticut legislature to take action under the Douglas Amendment to permit out-of-state entry. Furthermore, the legislature has, in view of the Commission, a wide range of choice in fashioning a law that would permit such entry. That is, the legislature is not simply limited to a choice between retaining the Douglas Amendment barrier, on one hand, or doing away with it entirely, on the other. It may, if it so elects, condition entry into Connecticut in a way that would promote the best interests of the state of Connecticut and its citizens.

The Commission is keenly aware that issues of interstate banking are of concern to a wide range of interests in Connecticut. We have tried to take these interests into account in fashioning our recommendations. While we believe, as we set forth in more detail below, that the legislature should give favorable consideration to some form of interstate banking, we also believe that a balanced and evenhanded approach should be taken to the issue.

In the view of the Commission, the primary advantage for citizens of Connecticut in opening the state to interstate banking would be to increase competition in banking in Connecticut. While banking has historically been viewed as an industry that needs protection from excessive competition, in view of the overwhelming public interest in maintaining a sound banking system, the Commission believes that the interest of both consumers and businesses in Connecticut would be well

served by increasing the number of competitors and the vigor of banking competition in the state. The business of banking has experienced enormous innovation in recent years, and with increasing deregulation of banking at the federal level, the Commission believes that the future will also be a time of great innovation in banking. While Connecticut banking institutions have served our state extremely well, we believe that an infusion of additional competitive vigor into Connecticut would not only enhance the competitive performance of our own banks but would bring to bank customers in Connecticut the benefits of increased innovation in banking. Furthermore, the Commission believes that as our citizens become increasingly mobile, banking can no longer be viewed as an industry that is neatly segregable by state boundaries. Banking is very much an interstate business, and we must not close our eyes to the fact that banking in Connecticut is simply part of our nation's overall banking structure.

While we believe that the enhancement of competition in banking in Connecticut is the major goal to be served by any change in Connecticut law that would permit entry by out-of-state banking institutions, it must also be recognized, we believe, that the ability of Connecticut banks to compete in markets outside Connecticut may well depend upon Connecticut's attitudes toward interstate banking. Several states that have recently enacted laws to permit entry by out-of-state banking organizations have done so on the basis of reciprocity. That is, they have permitted out-of-state entry only from those states into which their own banks would be permitted reciprocal entry. If such laws become the prevading pattern for state laws relating to interstate banking, as we think they may, Connecticut may have an additional interest in modifying its laws in this regard so as to advance the interests of its own banks. It is plainly in the interests of Connecticut that Connecticut-based banks have the opportunity to grow and become stronger through geographic expansion.

At the same time, we believe that there are countervailing concerns that weigh against wholesale elimination of the Douglas Amendment prohibition. There are presently 63 savings banks, 40 commercial banks and 19 savings and loan associations in Connecticut, many of which are quite small. These banks have been devoted over the years to serving Connecticut markets and Connecticut customers, and we believe that they have been doing a good job. The shareholders of these banks are themselves, for the most part, citizens of Connecticut, whose interests, just as those of consumers of banking services in Connecticut, are entitled to consideration by our legislature.

Both at the national and state levels the philosophy underlying our structure of bank regulation has been to promote a pluralistic banking system—a system comprised of many units, rather than a highly concentrated system made up of a few large banks. The promotion of local ownership and control of banks has as one of its objectives the preservation of a close relationship between those in our communities who need credit and those who provide credit. To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and businesses would not, we believe, serve our state well. Similarly, to expose our smaller banks to the rigors of unlimited competition from large out-of-state banking organizations—particularly at a time when deregulation of banking products at the federal level is already putting strains on the resources of smaller banks—would not be wise.

In an effort to balance the various conflicting considerations that bear on the issues of interstate banking, the Commission has concluded and recommends that a legislative program embodying the following principles should be given favorable consideration:

1. An experiment in interstate banking would be desirable. By "experiment" we mean a first step toward interstate banking that would allow limited entry by out-of-state banking organizations and would afford the legislature an opportunity to make its own calculus of the benefits and detriments that might result from a broader program of interstate banking.

2. De novo entry into Connecticut by out-of-state banking organizations should not now be permitted. While we recognize that de novo expansion is generally thought to be pro-competitive, we believe it would present a potentially serious threat to the owners of Connecticut banks to permit de novo entry at this time. We recognize that if Connecticut were opened to out-of-state entry, the value of existing banks may well be enhanced. On the other hand, the ability of a large potential entrant to come in de novo may well have the effect of tipping the bargaining power in favor of the out-of-state interest. Were de novo entry to be permitted, the value of an existing franchise would be limited by some factor relating to the potential entrant's cost of de novo entry. While we do not believe that it is the purpose of our banking laws to create or preserve value for bank stockholders, we believe that the owners of existing banks have a legitimate claim, at least during a transitional period, not to have their equity devalued by a sudden change in the structural rules.

3. The range of potential entrants should be limited, at least initially, by area of origin. The Commission believes that out-of-state entry into Connecticut during the "experiment" should be restricted only to banking organizations having their principal place of banking business in another New England state. We believe that there is a natural economic and cultural community of interest among the New England states that would make

such an experiment in regional banking a reasonable first step toward interstate banking. We further believe that the legislature would be justified in excluding New York from this first phase on the ground that New York is the home state of a number of the nation's very largest banking institutions and that it is necessary to assess the impact of out-of-state entry upon Connecticut banks in a more limited experiment in interstate banking before exposing our banking system to the full rigor of competition from these giant institutions.

4. Out-of-state entry should be conditioned upon reciprocity. That is, we should permit entry only from those states into which Connecticut banking organizations would be permitted reciprocal entry.

5. To enhance the competition position of Connecticut's banking institutions, we suggest the relaxation of restraints on intrastate multi-office banking.

6. The approval of the Connecticut Banking Commissioner should be required for the acquisition of any bank in Connecticut by an out-of-state bank holding company, and in considering applications for such acquisitions the Commissioner should be required to consider the effect of the acquisition on the financial and managerial resources of the acquired bank, the effect of the acquisition on competition, and the likelihood that the acquisition will serve the public interest.

* * * * *

In summary, we recommend that the legislature adopt a measure permitting banking institutions from the New England states to acquire existing banks in Connecticut, subject to the approval of the Banking Commissioner, and subject

further to the requirement that Connecticut banking organizations are permitted to enter the acquirer's state under conditions no more onerous than those imposed by Connecticut and that appropriate review of the restrictions on intrastate geographical expansion be considered.

Respectfully Submitted,

Edwin Gordon Hebb, Jr.,
Chairman

The Commission to Study
Legislation to Limit the Conduct
of Business in Connecticut by
Subsidiaries of Bank Holding
Companies

* * * * *

Commissioners Robert G. Gilligan, Clarence Gustafson and John Sponheimer are in agreement with the Report.

Commissioner Frank Coyle agrees with the Report, but takes exception to Recommendation No. 5.

Commissioner William J. Sullivan was ill and unable to participate in the findings and recommendations within the Report.